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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

LOCAL 50, AMERICAN BAKERY & CONFECTIONERY WORKERS UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Local 50, American Bakery and Confectionery Workers Union, AFL-CIO prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 339 F. 2d 324 and is reprinted in Appendix A, pp. 1a-11a, *infra*. The Decision and Order of the National Labor Relations Board is reported at 143 NLRB 233 and is reprinted in Appendix B, pp. 12a-26a, *infra*.

JURISDICTION

The case was decided by the Court of Appeals on November 24, 1964. Timely petitions for rehearing and for rehearing en banc were denied on January 15, 1965 and the decree enforcing the order of the Board entered on January 18, 1965. On April 7, 1965 Mr. Justice Harlan entered an order extending the time for filing a petition for a writ of certiorari to June 14, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does an interpretation of a collective agreement which affects employment rights violate § 8(a)(3) of the Taft-Hartley Act merely because the factual predicate of the interpretation appears in the by-laws of the union?

2. Does an interpretation of a collective agreement which affects employment rights violate § 8(a)(3) of the Taft-Hartley Act because the factual predicate of the interpretation is not expressly spelled out in the agreement, even though the same interpretation would be lawful if its factual basis were spelled out in the agreement?

STATUTE INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2), 8(d) and 203 (d) of the Labor Management Relations Act of 1947 as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 161 *et seq.*). These provisions are printed as Appendix C to this Petition, pp. 27a-30a.

STATEMENT OF THE CASE

A. The Background Facts[1]

Petitioner Local 50, American Bakery & Confectionery Workers Union, AFL-CIO (hereafter the Union) is the collective bargaining representative of the employees of Ward Baking Company at Ward's Bronx plant. The Union began a strike at the Bronx plant on September 1, 1962, over the terms of a new collective bargaining agreement. During the course of the strike an employee, Charles Fisher, the charging party in the Labor Board proceeding, who was a member of Local 50, obtained employment in Ward's Newark plant whose employees are represented by Local 84 of the American Bakery & Confectionery Workers Union, AFL-CIO, a sister Local of petitioner. On October 29, Fisher came to the offices of Local 50 and requested the Union to issue to him a withdrawal card pursuant to the by-laws of Local 50 and the American Bakery & Confectionery Workers International Union (hereafter the International). These provisions, which are identical (JA pp. 173-4; 175-6), entitle a member of one Local, upon request, to seek employment in the jurisdiction of another local and to join the other local without paying a new initia-

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[1] Except for the text of documents which are printed in the record, this Statement is taken from the findings of the Trial Examiner (JA pp. 181-187) which were affirmed by the Board (JA p. 178). Appropriate record references are given for all quotations from documents. Throughout this Petition "JA" refers to the Joint Appendix in the Court of Appeals, which is Volume I of the Record filed with the Clerk, and "Supp. App." refers to the Supplemental Appendix which was printed as an Appendix to the Union's Brief below and which is in Volume II of the Record filed with the Clerk. Nine copies of the Joint Appendix and nine copies of the Union's Brief below have been lodged with the Clerk.

tion fee. The relevant provisions of Article XIV of the Local 50 by-laws are as follows: (JA pp. 173-4)

> § 1 "A withdrawal card shall signify that the member has voluntarily withdrawn from his Local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his Local union."
>
> § 2. "A Local *shall issue* a withdrawal card *upon application* by a member, if the member is paid up in his dues, assessments and fines including the month of issuance and pays a fee of $2.00." (Emphasis supplied)
>
> § 4 provides:
>
> "Upon depositing his valid withdrawal card with any Local union a member shall be readmitted to active membership *without the payment of a new initiation fee* upon the same terms and conditions as apply to other active members." (Emphasis supplied).

On November 7, the strike ended with the signing of a settlement agreement, renewing (with modifications not here relevant) the prior agreement between the union and the company. The agreement provided that "all present employees shall, as a condition of continued employment maintain their membership in the union during the life of this agreement through regular payment of dues to the union." (Supp. App. p. 6a) The contract also gave the employees seniority rights but provided that these terminate when the employee "voluntarily quits" or loses his job for other reasons specified in the agreement (JA pp. 171-172). Because of a substantial reduction in the work to be performed at the Bronx plant only about 60 of the approximately 450 employees were to be recalled im-

mediately and on November 8 company and Union representatives met to determine which employees should be recalled. The parties used a Company-wide roster, and going down name by name followed seniority in determining who was to be recalled. Because it is critical to this case we quote directly the findings relating to the circumstances by which it was determined that Fisher would not be recalled:

> "When Fisher's name (35th on the list) was reached, the Union took the position that he had obtained a 'transfer' or withdrawal card and was not entitled to recall. Accordingly, his name was scratched on the list and he was passed over." (JA p. 182)

The Trial Examiner also found that:

> "the Union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA p. 185)

During the following week Fisher was laid off at the Newark plant due to the reduction in force and then inquired regarding a job at the Bronx plant. Within the next few days two Union representatives reiterated to McGuire that Fisher was not entitled to reinstatement.

B. Proceedings Below

Fisher thereupon filed a charge with the Labor Board alleging that the Union had violated §8(b)(1)(A) and 8(b)(2) by opposing his reinstatement. The General Counsel issued a complaint on that charge alleging alternatively that the Union had caused the Company to discriminate against Fisher because Fisher

"had obtained a withdrawal of membership card from Respondent" and/or "worked for Ward during the strike." After the usual hearing Trial Examiner Ivar H. Peterson rejected the latter allegation (JA p. 187, n. 4) but nonetheless found the union guilty of violating §8(b)(1)(A) and 8(b)(2). His reasoning was as follows: (JA pp. 187-88)

> "The refusal of the Company to reinstate Fisher was the direct result of the position taken by the Respondent's representatives in the November 8 conference with Personnel Manager McGuire and in subsequent conversations with him. In thus insisting that the procurement of a withdrawal card from the Union was the equivalent of a voluntary quit, a result not sanctioned by the contract but indeed contrary to its provisions governing loss of seniority, the Respondent caused the Company to discriminate against Fisher. The Respondent's real purpose, I find, was to enforce as a condition of employment its bylaws provision that by obtaining a withdrawal card a member withdrew 'from holding or seeking employment' within the work or geographic jurisdiction of the Respondent,[5] and thereby to encourage employees to remain active members of the Union. Accordingly, I find that the Respondent caused the Company to discriminate against Fisher in violation of Section 8(a)(3) of the Act and that thereby the Respondent violated Section 8(b)(2) and (1)(A) of the Act."[6]

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[5] Stated otherwise, what the Union's position comes down to is that only active members, excluding those who have taken out a withdrawal card, are entitled, under this provision in its bylaws, to hold or seek employment within the Union's work or geographic jurisdiction. This, it seems to me, is tantamount to attempting to maintain closed-shop conditions.

[6] See *Brunswick-Balke-Collender Company*, 135 NLRB 574; *International Union of Operating Engineers, Local No. 12, AFL-CIO (Engineers Limited and Pacific Pipeline Construction)*, 135 NLRB 1252.

The Examiner recommended that the Union be ordered to notify Ward that it has no objection to Fisher's reinstatement and to make Fisher whole for any loss of pay as a result of the period in which he was declined reinstatement.

The union excepted to the Trial Examiner's Intermediate Report, but the Board in its Decision and Order (JA pp. 177-179) affirmed his findings, conclusions and recommendations, adding the following explanation set out as a footnote to its decision:

> "As set forth in the Intermediate Report, the Respondent's bylaws and the constitution of its International each contain a provision which states: 'A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union.' In view of the specific findings of the Trial Examiner, which we are adopting, that the provision in question was not in the contract between the Respondent and the Company, and therefore, cannot avail the Respondent as a defense, we do not reach or pass upon the issue of the legality of such a provision if it were a part of the contract." (JA p. 178, n. 2)

The Court of Appeals enforced the Board's order, Judge Friendly dissenting. (Appendix A, pp. 1a-11a, *infra.*)

REASONS FOR GRANTING THE WRIT

Introduction

The Board found the denial of reinstatement to Fisher to be illegal because the union relied on a by-law based provision in urging that Fisher not be reinstated and because that provision was not incorporated in the agreement. Each of these elements raises issues worthy of the attention of this Court: In holding that the Union violated the Act because a Union by-law was involved, the Board misreads *Radio Officers* v. *Labor Board,* 347 U.S. 17, in a manner which penalizes unions for having perfectly lawful union rules, and specifically jeopardizes the continuing validity of withdrawal-card rules which are an almost universal phenomenon in the labor movement and which enhance rather than restrict the rights of members; the further holding that the legality of resolution of a question arising under an agreement depends on whether its basis is explicitly spelled out therein is utterly without statutory foundation and seriously embarrasses the collective bargaining process and especially the administration of contracts.

I. The Court Below Has Sanctioned a Misreading of Radio Officers Which Jeopardizes Traditional and Widespread Union Practices

In *Radio Officers* v. *Labor Board,* 347 U.S. 17, 40, this Court held that subject to limitations, the phrase "membership in a labor organization" in § 8(a)(3) includes "participation in Union activities as well as * * * adhesion to union membership.":

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8 (a)(3) and 8(b)(2) were designed to allow em-

> ployees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Id.*

Thus, the Court held that a union could not punish a member for violating the union's rules by causing the employer to disadvantage him in the employment relationship.[2] The question presented by this case, however, is whether the Board properly extended *Radio Officers* to find a violation where the union did not cause an employee's *punishment* for *violating* the rule, but rather resorted to the rule only to interpret an action of the employee and to determine his status under the collective bargaining agreement in light of that action.

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[2] The Court was not called upon in *Radio Officers* to consider the scope of the "limitations" (347 U.S. at 39) to which this principle was subject in interpreting "union membership" where encouragement is alleged. In our view the statute contemplates a distinction between those union rules which relate to the members' associational rights and those which deal with the employment situation. The "discouragement" cases cited by the Court, 347 U.S. at 39, n. 38, support this distinction. The issue is an important one, because unions have historically prescribed minimum employment standards or goals in their bylaws. A holding that a union violates the Act when it obtains the employer's acquiescence to such rules would seriously interfere with the rights of unions without promoting the Congressional objective to outlaw the closed shop. It may be that this issue is imbedded in the instant case and would have been presented if the Board's finding that the union was enforcing its by-laws were correct and if the Board had articulated its reasons for believing that the by-law promotes "membership" within the meaning of § 8(a)(3). See pp. 14-16, *infra*. We wish to preserve our right to argue the issue if certiorari is granted since the Court might conclude that it is necessary to the disposition of the case.

The Union and the Company were determining what employees should be returned to work and proceeded under the seniority provisions of the collective bargaining agreement. One of these provisions was that an employee loses his seniority rights if he "voluntarily quits" (JA p. 185). We repeat the critical finding of what occurred:

> "The union's representatives told Personnel Manager McGuire that Fisher was not to be recalled because he had taken out a withdrawal card from the Union and thus had quit his employment." (JA pp. 184-185)

This finding makes clear that the Union was not punishing Fisher for having taken a withdrawal card, but that it was simply interpreting his act of taking a withdrawal card in the light of the by-law to conclude that he had "voluntarily quit". The Union's understanding was based on the fact that the by-laws relating to withdrawal cards expressly provide:

> "A withdrawal card shall signify that the member has voluntarily withdrawn from his local's rolls of active members and has withdrawn from holding or seeking employment within the work or geographic jurisdiction of this International or his local union." (JA p. 173)

Thus, the taking of a withdrawal card symbolized Fisher's voluntarily quitting just as a letter from him to the Union stating "I, Charles Fisher, voluntarily quit my employment at Ward's Bronx Plant." It is also the same as if there were a general custom, not embodied in a rule, that members who take withdrawal cards are "withdrawing", i.e. are leaving the local's jurisdiction to seek work elsewhere. If there had been such a practice the Union officials' understanding would have been the same as here, and in discussing

with the employer whether any of the employees on the seniority list had "voluntarily quit" they would have taken the same action that they took in this case.[3] Yet the Board would not find a violation in either of these hypothetical situations because under its theory the existence of a published Union rule is an element of the offense. To allow liability to be predicated on the mere existence of a Union rule is to seriously misread and expand *Radio Officers;* the principle of that decision is that an employee may not be punished (either by the employer independently or at the behest of a Union) because he has failed to obey a Union rule. In terms of *Radio Officers,* one cannot be a "good member" or a "bad member" in relation to the petitioner's withdrawal card by-laws.[4] One can only choose to exercise the privilege granted by them by accepting the status which that implies or one can decline to exercise that choice. To find a violation under these circumstances is not "to insulate employees' job rights from their membership rights," but rather is to grant job rights to an employee to which he

[3] Indeed, in the performance of their function as representative of all the employees in the unit the union officials would have had an obligation (though it is not necessarily one enforceable by the Board, cf. *N.L.R.B.* v. *Miranda Fuel Company,* 326 F.2d 172, CA 2) to utilize all the facts available in determining what employees had retained seniority. For if an employee is improperly allowed to retain seniority he would displace another employee (here, approximately the 61st on the list) who is entitled to the job.

[4] On this point the Court of Appeals' understanding of *Radio Officers* seems to have been correct but it misunderstood the nature of the bylaw. The Court said that the Union "could have punished Fisher for circumventing the withdrawal card rules by taking appropriate intra-union disciplinary action. But Fisher's job was shielded from his obligations to the Union, with but a single exception." (App. A, p. 6a, *infra.*) The Court erred in its view that the by-law is of a kind which can be "circumvented" with intra-union penalties imposed against members who do so.

would not be entitled under the collective agreement merely because the Union has a membership rule dealing with the subject.

Nor can the Board's conclusion that the Union violated the Act be sustained on the basis of its "finding"[5] on motivation. Indeed, the Court of Appeals' disposition of that finding on review gives rise to an independent reason for certiorari. The Board's finding on motivation was as follows:

> "The Respondent's real purpose, I find, was to enforce as a condition of employment its by-law provision that by obtaining a withdrawal card a member withdrew 'from holding or seeking employment' within the work or geographic jurisdiction of the Respondent, and thereby to encourage employees to remain active members of the Union." (JA p. 187)

We submit that in reviewing this determination the Court of Appeals failed to follow the standards of review which have been delineated by this Court. If this assessment is correct then certiorari is plainly warranted. See, e.g. *Labor Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374; *FCC* v. *Schreiber*, 381 U.S. —, 33 LW 4492. That it is indeed correct we shall now show:

(a) The quoted conclusion regarding motivation simply does not follow from the factual finding of what the Union did which was quoted at p. 10, *supra*. The

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[5] The reviewability of a motivation determination does not, of course, depend on its characterization by the Board, but on the statutory standards as explicated by this Court and discussed in the text. Cf. *Baumgartner* v. *United States*, 322 U.S. 665, 670-71. Accordingly, we will not quibble with its use of the word "find".

determination of the Union's or Employer's true motive, which is controlling under *Radio Officers,* is of course subject to the scrutiny of the reviewing Court, as was again shown in *Labor Board* v. *Brown,* 380 U.S. 278 and *American Shipbuilding* v. *Labor Board,* 380 U.S. 300. Yet the Court of Appeals did not consider whether this finding was supported by substantial evidence on the record as a whole, as *Universal Camera* v. *Labor Board,* 340 U.S. 474 requires. Rather, it attributed to the Board a determination that specific proof of motive was unnecessary:

> "It has long been clear that specific proof of intent to encourage union membership is unnecessary where the Employer's conduct inherently has such effects. *Radio Officers', supra,* 347 U.S. at 45, 74 S.Ct. 323. We cannot say that it was unreasonable for the Board to conclude, especially in light of its expertise in labor disputes, that Ward's subservience to the Union in refusing to reinstate Fisher because he had secured a withdrawal card would serve in the future to encourage fellow workers to remain *active* Union members during a strike and to discourage transfers to sister locals." App. A, p. 7a, *infra.* Court's emphasis)

On the same premise the Court of Appeals placed the burden of proof on the issue of motive *on the union* though it did not dispute that the Union "honestly believed Fisher had 'quit' ". App. A, pp. 7a-8a, *infra.* We find nothing in the Board's decision which suggests that it concluded that the Union's conduct had an inherent illegal effect. Yet even if the Court is right in its interpretation of the Board's decision it is undisputable that the Board failed to disclose the basis of its determination that the Union's conduct fell into the narrow class of cases discussed in *Radio*

Officers, 347 U.S. at 45 in which specific evidence of intent is unnecessary. Compare *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 224, 227 with *Labor Board* v. *Brown,* 380 U.S. 278, 286-290. Since the correctness of such a determination is a question of law subject to judicial review,[6] the Court of Appeals was at the very least required to remand the case to the Board for further elucidation of its reasoning. *Labor Board* v. *Metropolitan Life Insurance Co.,* 380 U.S. 438; *SEC* v. *Chenery Corp.,* 318 U.S. 80; 332 U.S. 194. The necessity for a fuller explanation by the Board is emphasized rather than eliminated by the Court of Appeals' express reliance on the Board's "expertise in labor disputes." Compare *Labor Board* v. *Metropolitan Life Insurance Co., supra,* at 443; *Phelps Dodge Corp.* v. *N.L.R.B.,* 313 U.S. 177, 197. On the other hand if our interpretation of the Board's decision is correct then the Court of Appeals was in error because it affirmed the Board's decision on grounds other than those on which it rested. *SEC* v. *Chenery Corp., supra; Burlington Truck Lines* v. *U.S.,* 371 U.S. 156, 168-169.

(b) The Board's decision makes it impossible to determine whether the found motive is illegal under the Act. The Board nowhere states what it means when it says that the Union sought "to encourage em-

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[6] See e.g. *Labor Board* v. *Brown, supra,* particularly at 290-292. That the Court of Appeals did not even begin to consider this question of law is clear on the face of its opinion. If the question had been adequately considered and decided below, it would be of sufficient importance to warrant review here, particularly because of the prevalence of such by-law provisions, see pp. 16-17, *infra.* The Court's failure to perform this duty should not immunize its judgment from review.

ployees to remain *active* members of the Union." (JA p. 188, emphasis supplied). We know what is *not* meant by "active membership." It does not mean refusing to work at the Company's Newark plant during the strike. The General Counsel alleged that this was a motivation of the Union's conduct but the Trial Examiner expressly found that this allegation was not supported by the record (JA 187, n.4).[7] The fortuity that the Union used the term "active membership" in its by-law is surely insufficient to warrant a conclusion that its purpose was to encourage "participation in union activities" within the meaning of *Radio Officers,* 347 U.S. at 40. Indeed the very existence of the by-law enables a member to withdraw from Union activities without suffering the internal consequences of outright resignation from the Union, such as the requirement of an initiation fee if he joins another local. Thus, even if the Board had properly found that the Union's purpose was to enforce the by-law, it could not be said that this purpose was one proscribed by § 8(a)(3) and § 8(b)(2). Here again, the majority below failed to require the Board to properly explicate the basis of its decision, despite the fact that Judge Friendly expressly observed the inappropriateness of the Board's and the Court's reliance on the word "active" in the Union's by-law. App. A, pp. 10a-11a, *infra.* If the Board and the Court had focussed on precisely what membership activities were being encouraged by the by-laws which the Union purportedly was enforcing it would have been necessary for them to consider next whether these constitute "membership" within § 8(a)(3) as interpreted in *Radio Officers.* See n. 2 and

[7] The General Counsel excepted to this finding but the Board permitted it to stand.

6, *supra*. We do, of course, know what the true function of the withdrawal card provisions is. These provisions balance the conflicting interests in reducing work competition among members of the International Union from different jurisdictions and preserving mobility to the members.[8] The latter objective plainly contravenes no statutory objective, and the Board has repeatedly held that the reduction of work competition is a legitimate Union objective which may be accomplished even by causing employers to refuse to hire or reduce the seniority of employees.[9] There is, therefore, no readily imaginable basis for concluding either that the union had a purpose to encourage active membership or for concluding that such "active membership" (whatever that may mean) is "membership" within the meaning of the statute.

In sum, the Board's decision, which was sanctioned by the Court of Appeals, raises a substantial and recurring question whether this Court's decision in *Radio Officers* v. *Labor Board* has been misapplied. The Board's expansion of *Radio Officers* to find a violation of the Act because a Union rule is involved in the interpretation of an agreement, though no one is being punished for disobeying such a rule, penalizes

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[8] See Ulman, *The Rise of the National Trade Union* (Harvard Univ. Press, 1955) pp. 76-141.

[9] See e.g. *Plaza Builders*, 134 NLRB 751; *Yonkers Contracting Corporation*, 135 NLRB 865; *Planet Corporation*, 144 NLRB 798; *Houston Chronicle Corporation*, 145 NLRB No. 153; *Townsend & Bottum, Inc.*, 147 NLRB No. 95, 56 LRRM 1350. Cf. *Cafero* v. *N.L.R.B.*, 336 F.2d 115 (CA 2) affirming 144 NLRB 1555 where the Board held that the Union had "a legitimate purpose of attempting to give the work of the trade to those who presumably needed it rather than to those who held full time positions elsewhere." 144 NLRB at 1558.

unions for the very existence of the rule. As applied in this case the Board's theory jeopardizes the continuing validity of withdrawal card provisions which are contained in identical or similar form in the constitutions of most national unions.[10] We have annexed as App. D to our petition a partial list of national unions which have provision for clearance, transfer, travel or withdrawal cards. These rules, as we observed above, are salutary and contravene no statutory objective.

II. The Board's Decision Interferes Seriously With the Collective Bargaining Process

The Board's decision raises an additional question which warrants review by this Court because the Board's answer seriously interferes with the collective bargaining process. For the Board's theory is that the legality of the parties' interpretation of a collective agreement depends on whether its factual basis is expressly spelled out in the agreement. The Trial Examiner repeatedly relies on the fact that there is nothing in the collective agreement between Ward and Local 50 which provides that a member of Local 50 who takes a withdrawal card loses his seniority or "voluntarily quits." JA pp. 183, 186 (twice), 187. The Board expressly left open "the issue of the legality of such a provision, if it were part of the contract." JA p. 178, n. 2 quoted at p. 7, *supra*. Finally, the Court of Appeals stated three times that it was critical to the decision that the contract did not provide that a person who takes a withdrawal card has quit and distinguished its own precedents on that basis. (App. 4a, 5a, 6a).

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[10] See Ulman, *Op. cit.* n. 8, *supra*, pp. 68-152; Peterson, *American Labor Unions* (Harper & Row, 2d ed., 1963) pp. 90-91.

It is clear on the face of the statute that the legality of a Union's and an employer's conduct under § 8(a)(3) is unaffected by whether their action is based upon the explicit terms of a collective bargaining agreement. The sole exception is that the first proviso to § 8(a)(3) provides a defense where the parties have entered into a union security agreement within the terms of that proviso.[11] In § 8(d) Congress requires the parties "to confer in good faith with respect to wages, hours and other terms and conditions of employment, for the negotiation of an agreement *or any question arising thereunder* * * *" (Emphasis supplied). Cf. § 203(d) The resolution of grievances is part and parcel of the collective bargaining process and the conclusions reached by the parties are no more nor less subject to attack under § 8(a)(3) depending on the stage of the collective bargaining process when the determination is reached. This Court in *United Steelworkers* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, 578-582, discussed at length why provisions like collective agreements necessarily contain large areas of uncertainty. Indeed, the parties often find it easier to reach agreement on a contract without a strike because they know that they need not anticipate all questions which might arise during its life.

[11] Such an agreement is, of course, present here. We think the existence of the Union security clause is not necessary as a defense since we believe that there was no discrimination to encourage membership within the meaning of § 8(a)(3). But if these terms are broadly read, as the majority below and Judge Friendly apparently read them, then we agree with the dissent that the Board cannot escape the dilemma that the term "membership" must mean in the first proviso what it means in the statute proper.

This Court has had repeated occasion to remind the Board and Courts of Appeals that the terms of collective agreements are for the parties themselves to decide. *Labor Board* v. *American National Insurance Co.*, 343 U.S. 395, 404; *Carpenters' Union* v. *Labor Board*, 357 U.S. 93, 108; *Teamsters Union* v. *Oliver*, 358 U.S. 283, 295; *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 490, 498; *Teamsters Union* v. *Labor Board*, 365 U.S. 667, 676-677. The extent to which the rules governing seniority and other employee prerogatives are to be spelled out in the agreement or left open for subsequent elaboration is no less a matter for the parties' judgment during bargaining than whether or not there should be a no-strike clause or an exclusive hiring hall. Yet in *Miranda Fuel Company*, 140 NLRB 161 *reversed* 326 F.2d 172 (CA 2) the Board found a violation because a seniority dispute had been resolved on grounds not spelled out in the agreement; here the Board rested on the additional element that the Union relied on its by-law in interpreting the phrase "voluntary quit" in agreement. The Board's theory is utterly without statutory foundation. The importance of the issue cannot be overemphasized. It is obvious that the bargaining process will be seriously inhibited if the resolution of an issue under an agreement can be held illegal because its factual basis is not expressly spelled out therein.

CONCLUSION

By reason of the foregoing this petition for certiorari should be granted.

Respectfully submitted,

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